

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

No. C 08-00237 MHP

Plaintiff,

MEMORANDUM & ORDER

v.

**Re: United States' Motion for Leave to File
Motion for Reconsideration**

DAVID NOSAL,

Defendant.
_____ /

Defendant David Nosal ("Nosal") was indicted on theft of trade secrets, illegal computer intrusion, and mail fraud. The government moves for leave to file a motion for reconsideration of the court's dismissal of counts twelve through twenty of the Superseding Indictment. Counts twelve through nineteen are mail fraud charges and count twenty is a conspiracy to commit mail fraud charge. The court granted defendant's motion to dismiss these charges in open court on March 2, 2009 and supplemented that ruling with a written Memorandum & Order issued April 13, 2009. See Docket Entry No. 105 ("Order").

The government asserts that it did not have a chance to fully address the issue upon which the court's ruling was based, that is, the lack of specificity and number of the Superseding Indictment's mail fraud allegations regarding misrepresentations made to further the fraudulent scheme, because defendant did not raise this issue in his motion to dismiss.

The government also asserts the Superseding Indictment adequately alleges each element of a mail fraud violation, because the implied element of materiality need not be asserted with respect to specific misrepresentations made in furtherance of the fraudulent scheme; that specific intent to

defraud need not be proven by direct evidence; and that a fraudulent scheme may be proven by the existence of half-truths or the concealment of material facts. See, e.g., United States v. Munoz, 233 F.3d 1117, 1131 (9th Cir. 2000). The government contends these principles are not reflected in the court's ruling that "suggests that the [c]ourt is doubtful that the government will be able to prove at trial the defendant's specific intent to defraud, or the existence of a scheme to defraud" (USA's Mot. at 10:13-15) based at least in part on "a dearth of allegations regarding intentional and specific misrepresentations of fact made to further the fraudulent scheme." Order at 13:7-8.

The court is not persuaded by these arguments. First of all, the court's ruling did not speak to the sufficiency of the government's evidence, but rather specifically addressed the partial invalidity of the indictment on its face based on a lack of allegations concerning a false and fraudulent pretense theory of mail fraud. See Order at 12-13.


Secondly, and as the government acknowledged, defendant's motion *did* address the lack of allegations relating to the mail fraud charges. That defendant may only have addressed the issue of specific representations made in furtherance of the fraudulent scheme at oral argument is probative not of the government's lack of an opportunity to adequately respond to these issues but rather of the government's failure to properly plead the allegations in the first place. As the court explained in its Order, the government relied in part on the theory of deprivation of honest services, but the Superceding Indictment does not. The allegations therein relate to a false and fraudulent pretenses theory instead. As a result, the Superceding Indictment falls short on pleading a recognizable scheme to defraud under false pretenses where the defendant made fraudulent representations that are designed and calculated to deceive and which are performed in furtherance of the scheme to defraud, even when considering the alleged mailings of defendant's monthly payment checks as "incident to an essential part of the scheme" or "a step in [the] plot." Schmuck v. United States, 489 U.S. 705, 711 (1989).

Thirdly, the court made clear at the March 2, 2009 oral hearing on this matter the basis for its ruling that the government failed to allege a scheme to defraud that involves the use of the mails in furtherance of the scheme and the specific intent to defraud. The court was under the impression, as was defendant (See Docket Entry No. 112, Def.'s Opp. to USA's Mot.) that the government

1 understood this ruling at that time, given the discussion concerning how a bill of particulars would
2 not be able to remedy the defects and a re-presentment to the grand jury would be required. The
3 government presents no basis to revisit the court's prior oral and written rulings now. Accordingly,
4 the government's motion for leave to file a motion for reconsideration is DENIED.

5 IT IS SO ORDERED.

6
7 Dated: May 26, 2009


MARILYN HALL PATEL
United States District Court Judge
Northern District of California